LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
SEP 18 1968
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

No. 537

HENDRY CORPORATION,
Petitioner,

versus

UNITED STATES FIDELITY AND GUARANTY COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

STANLEY W. ROSENKRANZ
CHARLES W. PITTMAN of
MACFARLANE, FERGUSON,
ALLISON & KELLY
P. O. Box 1531
Tampa, Florida 33601
Attorneys for Petitioner

FREE PRESS PUB. CO., INC. - TAMPA

INDEX

Page

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT 1

Decision to be Reviewed 1

Jurisdiction 2

Question Presented 3

Statutes Involved 3

STATEMENT OF THE CASE 4

ARGUMENT

A SURETY ON A "MILLER ACT" BOND IS BOUND, ABSENT FRAUD AND COLLUSION, BY A STATE COURT JUDGMENT AGAINST THE SURETY'S PRINCIPAL WHERE THE SURETY HAD KNOWLEDGE OF AND AN OPPORTUNITY TO DEFEND THE STATE COURT ACTION. 6

CONCLUSION 13

CERTIFICATE OF SERVICE 14

APPENDIX I Opinion of the United States Court of Appeals for the Fifth Circuit A-1

APPENDIX II Findings of Fact and Conclusions of Law of United States District Court for the Northern District of Florida A-24

AUTHORITIES

Barrett-Moore & Associates v. U.S. for Use of Harwell,
367 F.2d 122 (10th Cir. 1966) ---------- 10

Lake County v. Massachusetts Bonding & Ins. Co.,
5 Cir. 1935, 75 F.2d 6, 8 ---------- 6

Massachusetts Bonding & Ins. Co. v. Robert E. Denike, Inc.,
92 F.2d 657 (3d Cir. 1937) ---------- 2, 7

United States Fidelity and Guaranty Company v. Hendry Corporation,
391 F.2d 13 (5th Cir. 1968) ---------- 1, 5

United States v. Smith Engineering and Constr. Co.,
240 F.Supp. 189 (N.D. Fla. 1965) ---------- 1

United States for Use and Benefit of Capolino Sons, Inc. v. Electronic & Missile Facilities, Inc.,
364 F.2d 705 (2d Cir. 1966) ---------- 2, 10

U. S. for Use and Benefit of Frank A. Trucco & Co. v. Bergman Const. Corp.,
256 F.2d 851 (7th Cir. 1958) ---------- 10

U. S. for Use and Benefit of Industrial Engineering & Metal Fabricators, Inc. v. Eric Elevator Corp.,
214 F.Supp. 947 (D. Mass 1963) ---------- 10

U. S. for Use and Benefit of Ray Gains, Inc. v. Essential Const. Co.,
261 F.Supp. 715 (D. Md. 1966) ---------- 10

Wayside Transp. Co. v. Marcell's Motor Exp., Inc.,
248 F.2d 868 (1st Cir. 1960) ---------- 11

Williams v. Murdock,
330 F.2d 745 (3d Cir. 1964) ---------- 10

STATUTES:

Title 28 USC, Section 1254(1); c.646, 62 Stat. 928 -- 2

Title 40 USC, Section 270(b) ---------- 2, 3

Title 28 USC, Section 1738 ---------- 2, 3

IN THE

Supreme Court of the United States

NO. _____

HENDRY CORPORATION,

Petitioner,

versus

UNITED STATES FIDELITY AND GUARANTY COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Fifth Circuit entered in this cause.

DECISION TO BE REVIEWED

Petitioner seeks review of the decision rendered in *United States Fidelity and Guaranty Company v. Hendry Corporation,* 391 F.2d 13 (5th Cir. 1968) (R 117-145; Appendix I).

The decision of the United States District Court for the Northern District of Florida is reported, *United States v. Smith Engineering and Constr. Co.,* 240 F.Supp. 189 (N.D. Fla. 1965). (R 103-109; Appendix II).

JURISDICTION

Jurisdiction is based on Title 28 USC, Section 1254(1); c. 646, 62 Stat. 928.

The decision sought to be reviewed was entered February 29, 1968 (R-117-145; Appendix 1).

Petition for rehearing was denied by order dated June 20, 1968 (R. 147). No extensions of time have been granted within which to petition for certiorari.

Petitioner submits that the decision sought to be reviewed is in conflict with *Massachusetts Bonding & Ins. Co. v. Robert E. Denike, Inc.*, 92 F.2d 657 (3d Cir. 1937), and with *United States for Use and Benefit of Capolino Sons, Inc. v. Electronic & Missile Facilities, Inc.*, 364 F.2d 705 (2d Cir. 1966).

Petitioner further submits that the decision sought to be reviewed presents important questions under the Miller Act (40 USC, Section 270b) which affect the state-federal judicial relationship concerning the credit to be accorded state judgments in the federal courts (28 USC, Section 1738).

QUESTION PRESENTED

IN AN ACTION BY A SUBCONTRACTOR AGAINST THE CONTRACTOR'S SURETY ON A "MILLER ACT" BOND, IS A STATE COURT JUDGMENT AGAINST THE CONTRACTOR CONCLUSIVE EVIDENCE OF THE AMOUNT OWED THE SUBCONTRACTOR WHERE THE SURETY KNEW OF THE STATE COURT ACTION AND HAD AN OPPORTUNITY TO DEFEND AND THERE WAS NO FRAUD OR COLLUSION?

STATUTES INVOLVED

Section 270b(b) of Title 40, U.S.C. ("Miller Act") provides:

> "Every suit instituted under this section shall be brought in the name of the United States for the use of the person suing, in the United States District Court for any district in which the contract was to be performed and executed and not elsewhere, irrespective of the amount in controversy in such suit, but no such suit shall be commenced after the expiration of one year after the date of final settlement of such contract. The United States shall not be liable for the payment of any costs or expenses of any such suit. Aug. 24, 1935, c. 642, § 2, 49 Stat. 794."

Section 1738 of Title 28, U.S.C. provides:

> "The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.
>
> "The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Ter-

ritories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

"Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken. June 25, 1948, c. 646, 62 Stat. 947."

STATEMENT OF THE CASE

Hendry Corporation (Hendry) sued United States Fidelity and Guaranty Company (USF&G) in the United States District Court for the Northern District of Florida (R 1-5). The complaint charged that USF&G was indebted to Hendry on a "Miller Act" bond for materials furnished and work performed by Hendry for USF&G's principal, Smith Engineering and Construction Company (Smith).

Various pleadings, motions and affidavits were filed and some preliminary issues were resolved by the District Court. The cause ultimately came on for hearing on Hendry's motion for summary judgment. The District Court stated the posture of the case and the question involved here as follows:

"The use plaintiff Hendry moves for summary judgment seeking to recover from defendants under the provisions of the Miller Act for labor and materials supplied to Smith Engineering and Construction Company pursuant to a written contract. The contractual relationship and obligations arising thereunder between Hendry and Smith have been determined in a chancery proceeding in the Circuit Court of Escambia County, Florida. A certified true copy of the final decree entered by the State Court on July 13, 1964 is incorporated by reference and

made a part of the pleadings. United States Fidelity and Guaranty Corporation was not a party to the state litigation.

"The following questions are raised:

Is the decision of the state case conclusive evidence as to the amount actually owed to plaintiff?" 240 F.Supp. at 190; R 103-04.

The District Court recited these facts:

"United States Fidelity and Guaranty Corporation contends that the state case was not binding upon it since it was not joined in that proceeding. It does not, however, deny having knowledge of the state case. As a matter of fact, *the attorney for Smith in the state was also the attorney of record for United States Fidelity and Guaranty Corporation at that time.*" (Emphasis added.) 240 F.Supp. at 190; R 104.

The District Court held that the amount of the state court judgment against USF&G's principal was binding on USF&G.

USF&G appealed the summary judgment to the Court of Appeals for the Fifth Circuit which reversed the judgment of the District Court, Judge Godbold dissenting, *United States Fidelity and Guaranty Company v. Hendry Corporation,* 391 F.2d 13 (5th Cir. 1968) (Appendix I; R 117-145).

The Court of Appeals held that in a "Miller Act" case the amount of the surety's liability must be determined in a trial on the merits in the United States District Court.

Petitioner, Hendry Corporation, seeks review of that decision.

ARGUMENT

A SURETY ON A "MILLER ACT" BOND IS BOUND, ABSENT FRAUD AND COLLUSION, BY A STATE COURT JUDGMENT AGAINST THE SURETY'S PRINCIPAL WHERE THE SURETY HAD KNOWLEDGE OF AND AN OPPORTUNITY TO DEFEND THE STATE COURT ACTION.

The majority of the Court of Appeals recognized the principle of law that a surety is bound by a judgment against the surety's principal:

> "The usual law of suretyship on which the appellee relies is concisely stated in *Lake County v. Massachusetts Bonding & Ins. Co.*, 5 Cir. 1935, 75 F.2d 6, 8:
>
> > 'Where it appears that the judgment against the defendant was obtained in a suit of which it had full knowledge, and which it had full opportunity to defend, the judgment therein is not only evidence, but conclusive evidence, against every defense except that of fraud and collusion in obtaining it. . . . Where it is not made to appear that the surety knew of and had opportunity to defend the suit, then the judgment is prima facie evidence that the surety is liable, sufficient to support a verdict unless it is rebutted by proof on the part of the surety that it was obtained through fraud or collusion, or that the loss or liability created by the judgment arose from acts other than those indemnified against under the conditions of the bond.' " R 124.

The record supports Judge Godbold's statement of the factual context:

"Fidelity & Guaranty had knowledge of the suit against its principal and an opportunity to defend it. Both the state court proceeding against the principal and the federal suit on the bond took place in Pensacola, Florida. The same attorneys represented the principal in state court and the surety in federal court. Though the state suit was filed long before the federal suit it lay dormant, and in the active stages of litigation the two cases proceeded more or less concurrently." R 138

Undoubtedly under general suretyship law and Florida law the state court judgment against Smith would be conclusive evidence of the amount owed Hendry in an action against USF&G on its bond.

The Court of Appeals held that this principle of evidence and of suretyship law was inapposite in an action on a Miller Act bond because of the proviso in Title 28 USC, Section 270b(b) that "Every suit * * * shall be brought * * * in the United States District Court * * *." The Court of Appeals has held that this proviso was a jurisdictional limitation and that Congress has created a unique species of suretyship law to which the usual principles of suretyship law and evidence are inapposite. This decision collides with *Massachusetts Bonding & Ins. Co. v. Robert E. Denike, Inc.*, 92 F.2d 657 (3d Cir. 1937).

The *Massachusetts Bonding* case was based on the Heard Act, 33 Stat. 811, 812, which was the predecessor of the Miller Act. The subcontractor obtained judgment against the surety's principal in the state court and then sued the surety on the bond in the federal court (the same situation exists in the case at bar). The Court of Appeals for the Third Circuit said:

"In general, a judgment against the principal is prima facie evidence against the surety, and if the surety participates in the action against his principal, he is concluded as to the issues therein decided against his principal. . . .

"The Heard Act gives those who have furnished labor and material used in the construction of any public work and who have not been paid therefor . . . the right to institute suit against the contractor and sureties in the name of the United States to their use, . . . and, 'where suit is so instituted by a creditor . . . only one action shall be brought.' This provision refers only to an action brought 'on the bond' and not to some other suit not based on the bond directly. The suit in the state court was not brought on the bond. . . . and so the Heard Act does not apply to that suit." 92 F.2d at 658-59.

The surety was held bound by the state court judgment.

Petitioner submits that the *Massachusetts Bonding* case cannot be distinguished from the case at bar. Of course the wording of the Acts is different; the Heard Act allowed only one action and the Miller Act allows suit only in the District Court where the contract is performed. But the purpose of each is the same—to give some protection to Miller Act defendants. (R 127). Moreover a complete answer to the "jurisdictional" and venue proviso of the Miller Act is that *Hendry sued USF&G* in the District Court for the district where the contract was performed.

The venue proviso of the Miller Act does not purport to change rules of evidence, or perhaps to be more technical, to change a principle of suretyship law which provides for substituted evidence. As Judge Godbold said:

"I dissent from the conclusion of the majority. It is inconsistent with all previous Miller Act case law I am able to find on the subject. * * *

"The usual rule referred to above has long been applied in Miller Act and Heard Act cases without regard to whether the judgment against the principal was obtained in state or federal court. *Massachusetts Bonding & Ins. Co. v. Robert E. Denike, Inc.*, 92 F.2d 657 (3d Cir. 1937) (state court judgment); *United States ex rel. Larkin v. Maryland Casualty Co.*, 45 F.Supp. 286 (D. Mass. 1942) (state court judgment); *Herzog v. DesLauriers Steel Mould Co.*, 46 F.Supp. 211 (E.D. Pa. 1942) (federal court judgment). Compare *United States ex rel. Vigilanti v. Pfieffer-Neumeyer Constr. Corp.*, 25 F.Supp. 403 (E.D.N.Y. 1938)." R 138-39

The case at bar presents an important question under the Miller Act that should be passed upon by this Court, even if the *Massachusetts Bonding* case is not deemed in conflict because it is based on the Heard Act.[1] It is not uncommon for a public works contractor to sue a subcontractor or materialman in a state court for faulty workmanship or failure to deliver on schedule. Such claims produce counterclaims for payment. If the contractor prevails, the surety is entitled to raise the state court judgment as a bar under the doctrine of res judicata.[2] But if the subcontractor prevails in the state court action, must he prove his case a second time in the federal court before he gets paid? Suppose the contractor sued in the federal court on diversity of citizenship, would the federal court give credit to its own

---

[1] See concurring opinion of Mr. Chief Justice Warren in *Moseley v. Electronic & Missile Facilities, Inc.*, 374 U.S. 167, 83 S.Ct. 1815, 10 L.Ed. 2d 818 (1963), which declined to decide whether an arbitration provision in a Miller Act bond is enforceable.

[2] *Prichard v. Nelson*, 137 F.2d 312 (4th Cir. 1943).

judgment? These questions should be answered by this Court if the Miller Act is to have the liberal, remedial effect that was intended.[3]

Petitioner also submits that the appellate decision in the case at bar is completely at variance with the approach of the Court of Appeals for the Second Circuit in *United States for Use and Benefit of Capolino Sons, Inc. v. Electronic & Missile Facilities, Inc.*, 364 F.2d 705 (2d Cir. 1966), cert. dismissed 385 U.S. 924. The Second Circuit held that a subcontractor could not sue under the Miller Act until he had complied with the arbitration provision of his subcontract.[4] The Second Circuit held that the Federal Arbitration Act[5] applies to suits under the Miller Act.[6] In other words the Second Circuit says the Miller Act has not exempted operation of local and federal arbitration acts. Indeed, the arbitration agreement was enforced under *state* law. In the case at bar, the Fifth Circuit has held the Miller Act exempted operation of Title 28 USC, Section 1738, which requires federal courts to give full faith and credit to state court judgments.[7] It seems inconsistent to exempt the operation of a statute that has Constitutional[8] underpinnings and apply a local arbitration statute.

---

[3] *Barrett-Moore & Associates v. U. S. for Use of Harwell*, 367 F.2d 122 (10th Cir. 1966).

[4] The Seventh Circuit has held likewise, *U. S. for Use and Benefit of Frank A. Trucco & Sons Co. v. Bergman Const. Corp.*, 256 F.2d 851 (7th Cir. 1958).

[5] Title 9, USC.

[6] See also *U. S. for Use and Benefit of Industrial Engineering & Metal Fabricators, Inc. v. Eric Elevator Corp.*, 214 F.Supp. 947 (D. Mass. 1963), and *U. S. for Use and Benefit of Ray Gains, Inc. v. Essential Const. Co.*, 261 F.Supp. 715 (D.Md. 1966).

[7] *Williams v. Murdock*, 330 F.2d 745 (3d Cir. 1964).

[8] Article IV, Section 1.

The Fifth Circuit refused to give credit to the state court judgment because "The only function remaining for the federal district court would be to rubber-stamp the state judgment * * *." (R 126). Can there be any doubt that a federal court would rubber-stamp an arbitration award absent corruption or fraud, the same test that applies to suretyship cases? See Title 9 USC, Sections 10 & 11.

The principle that petitioner seeks to apply here is a rule of evidence, or a rule permitting substituted evidence, so that issues between parties or their privies will not be re-litigated. Section 1738 articulates the public policy that matters should not be re-litigated.[9]

The Second Circuit says an arbitrator may decide the issues but the Fifth Circuit says that a state court of competent jurisdiction may not decide the issues. There is a clash in approach to Miller Act problems.

The *Capolino* case raises another important federal question. The Second Circuit said:

> "Second, when our court last considered in detail the history and purpose of Section 2(b) of the Miller Act we concluded that the provision requiring Miller Act plaintiffs to bring suit in a United States district court for a district in which the contract was to be performed and not elsewhere was now of 'scant utility, save as a convenience to the defendants.' * * * We continue to believe this is a correct statement of that section's purpose. That case did not require us to decide whether Section 2(b) contained a venue requirement or a jurisdic-

[9] *Wayside Transp. Co. v. Marcell's Motor Exp., Inc.*, 248 F.2d 868 (1st Cir. 1960).

tional limitation. * * * But other courts that have decided this issue have, almost without exception, held that Section 2(b) is a venue requirement, and have agreed with us that its purpose is to give some incidental protection to Miller Act defendants. * * * It is thus quite settled that Section 2(b) of the Miller Act requiring Miller Act plaintiffs to sue in a federal district court for a district in which the contract was to be performed and not elsewhere *is a venue provision* benefiting defendants in some cases." (Citations omitted. Emphasis added.) 364 F.2d at 707.

The Fifth Circuit has held that the proviso is jurisdictional: "Congress vested exclusive jurisdiction over Miller Act suits in federal courts"; "The judgment of the district court is REVERSED, and the case is REMANDED to that court for a trial on the merits." (R 127, 137).

The exemption of the Miller Act from the operation of Section 1738 and the effect of the venue proviso in the Miller Act present important federal questions that have not been passed upon by this Court.

CONCLUSION

The Court should grant certiorari and hear the cause on the merits.

Respectifully submitted,

STANLEY W. ROSENKRANZ

CHARLES W. PITTMAN of
MACFARLANE, FERGUSON,
ALLISON & KELLY
P. O. Box 1531
Tampa, Florida 33601

Attorneys for Petitioner

CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that copy hereof has been furnished to each of the following by mail:

BERT LANE, ESQ.
BEGGS, LANE, DANIEL, GAINES & DAVIS
Attorneys at Law
Post Office Box 1351
Pensacola, Florida

RICHARD H. MERRITT, ESQ.
Attorney at Law
Lawyers' Building
Pensacola, Florida

Smith Engineering & Construction Company
Post Office Drawer 1831
Pensacola, Florida

Done this _____ day of September, 1968.

_____
CHARLES W. PITTMAN

APPENDIX I

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 22692

UNITED STATES FIDELITY AND GUARANTY COMPANY,

Appellant,

versus

HENDRY CORPORATION,

Appellee.

Appeal from the United States District Court for the Northern District of Florida.

(February 29, 1968.)

Before WISDOM, BELL and GODBOLD, Circuit Judges.

Wisdom, Circuit Judge: The United States Fidelity & Guaranty Company, the Miller Act surety for Smith Engineering Construction Company, a defaulting government contractor, appeals from a summary judgment in favor of Hendry Corporation, the use-plaintiff. *United States v. Smith Engineering & Constr. Co.*, N.D.Fla. 1965, 240 F. Supp. 189. The surety contends that the district court committed three major errors in granting summary judgment in favor of the plaintiff subcontractor. The alleged errors are first, the court's overruling the defendant's plea of the statute of limitations; second, its giving conclusive weight to a state judgment

in a suit by the plaintiff against the surety's principal; and finally, its allowing the plaintiff attorney's fees. We conclude that the court below was correct on the first and third counts, but erred as to the second. Accordingly, we reverse and remand the case for trial.

* * * *

In 1954 Smith, the prime contractor, successfully bid for the job of constructing runway and taxiway fill at Eglin Air Force Base, Florida. In accordance with the Miller Act, 40 U.S.C. §§ 270a-270e, Smith obtained payment and performance bonds from Fidelity & Guaranty. Smith and Hendry agreed that Hendry would supply certain equipment for the job. Hendry was to receive rental fees plus a share of whatever profits developed. In the course of the job, difficulties developed so that the fill had to be constructed mechanically rather than hydraulically. As a result, Smith incurred considerable unexpected expense and could not complete the contract on time.

By the late summer of 1955 Smith had completed the job. Because of the unexpected difficulties, he attempted to obtain some sort of adjustment from the government. Finally, March 6, 1961, the Board of Contract Appeals reversed the contracting officer, awarded Smith more than $130,000 additional compensation, and extended the contract time by 86 days. Fidelity & Guaranty agreed to the extension and to increase the penalty sum of the bond by half the increase in the contract price. Smith never did pay Hendry the amount due on their subcontract. Hendry filed this suit against the surety April 16, 1962.

Meanwhile Hendry had filed an action in the Florida courts for an accounting and judgment against Smith in whatever amount was found owing. After a non-jury trial on the merits, the state court rendered judgment in Hendry's favor in the amount of $93,113.79. The same attorney represented Smith in the state case and both Smith and Fidelity & Guaranty in this case.

Upon the rendition of judgment in the state case, Hendry moved the district court here for summary judgment. The district court granted the motion on the ground that the state decision was res judicata as to a surety with knowledge of and an opportunity to defend the suit against the principal. The district judge also allowed Hendry the maximum attorneys fees under Florida States § 627.0905(2).

I.

The Miller Act provided, at the time the present bond was signed,[1] that no suit should be commenced "after the expiration of one year after the date of final settlement of such contract." 40 U.S.C. § 270b (b). "Final Settlement", as used in the Act, was a term of art. It did not mean final payment or accord and satisfaction, but rather the "unilateral determination by the Government of the consolidated contract account . . . as shown by its records." 37 Dec. Comp. Gen. 115 (1957). Section 270c provided the method of establishing the date of final settlement. Any unpaid laborer or materialman could request the Comptroller General to issue a certificate determining the date of the settlement, "which shall be conclusive as to such date upon the parties."

The courts have consistently held that section 270c meant what it said. "[I]t is necessary to establish fraud or such gross mistake as would imply bad faith before the certificate of the Comptroller General can be set aside. . . . The plaintiff cannot claim as of right a broader review by the courts . . ." *Peerless Casualty Co. v. United States,* 1 Cir. 1957, 241 F.2d 811, 817. See also *United States v. Montgomery,* 3 Cir. 1959, 269 F.2d 752; *Golden West Constr. Co. v. United States,* 10 Cir. 1962, 304 F.2d 753; *United States v. Otis Williams & Co.,* D. Idaho, 1939, 30 F. Supp. 590; *United States v. Glasscock,* E.D.Mo. 1939, 27 F. Supp. 534.

[1] Congress amended the Act in 1959 to provide that the one year period would begin on the day "on which the last of the labor was performed or material was supplied . . .". 73 Stat. 279.

There is no claim of fraud or bad faith in this case. The problem here is that the Comptroller General has issued two certificates stating different dates of final settlement. Initially he certified the date as August 11, 1955, but after the decision of the Board of Contract Appeals, he issued an "amended certificate" fixing the date of final settlement as June 21, 1961. If the statute began to run on the earlier date, Hendry's claim is barred. But if the statute did not begin to run until 1961, the parties agree the suit was timely filed.

Fidelity & Guaranty argues that the Comptroller General's certificate is conclusive even as to him, and that therefore he had no authority to amend the original certificate in the absence of fraud or bad faith. Hendry, on the other hand, insists that the certificate is conclusive only "as to the parties," and that the Comptroller General may make any amendments he deems necessary and equitable.

We agree with Hendry. We find nothing in the statute to indicate that the Comptroller General is bound by his original certificate and cannot act to correct a mistake or revise his determination in light of new developments. On the contrary, the statute shows the intention of Congress to place the responsibility for fixing the date of final settlement within the absolute, unreviewable discretion of the Comptroller General. See *Peerless Casualty v. United States, supra.* Absent convincing evidence of a contrary congressional intent, it would not be consistent with such a broad grant of discretion to hold that the Comptroller General is foreclosed from redetermining the date of final settlement.[2]

[2] Illinois Surety Co. v. Peeler, 1916, 240 U.S. 214, 36 S.Ct. 321, 60 L.Ed. 609; R. P. Farnsworth & Co., Inc. v. Electrical Supply Co., 5 Cir. 1939, 112 F.2d 150, cert. denied, 1940, 311 U.S. 700; and Arnold v. United States, 4 Cir. 1922, 280 Fed. 338, writ of error dismissed, 1923, 263 U.S. 427, cited by the surety as establishing standards for fixing the date of final settlement, are wide of the mark. All were decided under the Heard Act which had no provision for the Comptroller General's issuance of a binding certificate.

Lane v. United States, 1916, 241 U.S. 201, 36 S.Ct. 599, 60 L.Ed. 956 is closely in point. The statute there in question provided that the Secretary of the Interior's determination of the heirs of an Indian was to be "final and conclusive". The Secretary originally determined that two adopted children were the heirs of the Indian in question. Later, other relatives urged the Secretary to reopen the decision on the ground that the adoption had been procured by fraud. The adopted children took the position that because the original determination was "final and conclusive" the Secretary was without power to reconsider.

The Supreme Court rejected the argument:

> The words "final and conclusive" describing the power given to the Secretary must be taken as conferring, and not as limiting or destroying, that authority. In other words, they must be treated as absolutely excluding the right to review in the courts . . . [T]he right to review on proper charges of newly discovered evidence or fraud a previous administrative order . . . [is] of the very essence of administrative authority . . .: 241 U. S. at 209.

For the same reasons we reject the surety's argument here.

Fidelity & Guaranty argues further that the statute authorizes the Comptroller General to issue a certificate only "in case final settlement of any such contract has been made. . . ." The quoted language, the surety contends, indicates that Congress contemplated that there would be only one date of final settlement, and that only after it had come about, could the Comptroller General issue a conclusive certificate. There being but one date of final settlement, the argument concludes, the Comptroller General's amendment is contrary to fact and therefore of no effect.

In support, Fidelity & Guaranty cites *United States v. Frankini Construction Co.*, D.Mass. 1956, 139 F. Supp. 153, a case in which Judge Wyzanski held that the pendency of an appeal to the Board of Contract Appeals did not toll the passing of the date of final settlement. That case is inapposite for two reasons. First, the prime contractor's appeal was unsuccessful; and, more importantly, the Comptroller General did not issue an amended certificate. The real thrust of the case is that the Comptroller General's final pronouncement, whatever it may be, is conclusive on the parties.

While we might agree that there can be only one date of final setllement, we are convinced that the Comptroller General's decision is not reviewable on the ground that it is contrary to fact. The administrator's ultimate determination in this case was that the final settlement occurred June 21, 1961. Since that determination cannot be challenged, the suit was timely filed.

II.

The Miller Act provides:

> "Every suit instituted under this section shall be brought in the name of the United States for the use of the person suing, *in the United States District Court* for any district in which the contract was performed and executed *and not elsewhere* . . ." 40 U.S.C. § 270b(b).

Hendry argues that this statutory language does not affect the right of a subcontractor or materialman to sue the principal in a state court; that the usual law of suretyship applies; that under the usual law of surveyship, if the surety has notice of the suit, the judgment of the state court binds the surety by collateral estoppel. The usual law of suretyship on which the appellee relies is concisely stated in *Lake County v. Massachusetts Bonding & Ins. Co.*, 5 Cir. 1935, 75 F.2d 6, 8:

> "Where it appears that the judgment against the defendant was obtained in a suit of which the

surety had full knowledge, and which it had full opportunity to defend, the judgment therein is not only evidence, but conclusive evidence, against every defense except that of fraud and collusion in obtaining it. . . . Where it is not made to appear that the surety knew of and had opportunity to defend the suit, then the judgment is prima facie evidence that the surety is liable, sufficient to support a verdict unless it is rebutted by proof on the part of the surety that it was obtained through fraud or collusion, or that the loss or liability created by the judgment arose from acts other than those indemnified against under the conditions of the bond."

See also *Seaboard Surety Co. v. Westwood Lake, Inc.*, 5 Cir. 1960, 277 F.2d 397, cert. denied, 364 U.S. 821.

This principle is inapposite when the plaintiff's recovery depends upon a Miller Act bond.

A. As stated in *Lake County,* the doctrine of estoppel against the surety rests on the principle that a surety with knowledge of a suit against the principal has a "full opportunity to defend" the suit and to protect its rights. But there is no such equitable principle at work here. The surety cannot protect its rights by joining in the the defense of the suit. It cannot intervene as defendant any more than it could be named as defendant in the first place. The state court would have no jurisdiction to consider the case. Thus, in *Pierce Contractors, Inc. v. Peerless Casualty Co.*, 1955, 81 So.2d 747, the contention was made, as it is made in this case, that the suit was not an action on the bond under the Miller Act but, "a complaint for breach of contract". The Florida Supreme Court brushed aside this contention with the observation—which is implicit here—that "the bond given under the Miller Act is relied on for recovery in the suit brought in Dade County". See also *Gardner v. Roberts-Nash Construction Corp.*, N.Y. Sup. Ct. 1951, 104 N.Y.S.2d 657.

B. The state court in *Pierce Contractors v. Peerless Co.* relied on the language of the Act vesting exclusive jurisdiction of Miller Act suits in "the United States District Court for any district where the contract is to be performed and executed and not elsewhere".[3] See *Koppers Co. v. Continental Casualty Co.*, 8 Cir. 1964, 337 F.2d 499, 506; *United States v. Aetna Casualty & Surety Co.*, 2 Cir. 1962, 297 F.2d 665, 669, n. 9. This unequivocal congressional mandate would be rendered meaningless—if it could be defeated by the simple expedient of a supplier's suing in the state court and serving notice on the impotent surety. As this case demonstrates, once the issues of liability and damages are determined, there is little left to be litigated. The only function remaining for the federal district court would be to rubber-stamp the state judgment and enter it against the surety.

If a Miller Act surety is bound by a state court judgment recognizing a supplier's claim against the principal—it is mere word-juggling to say that the suit in state court is not a suit under the Miller Act. The assumption that the Act permits such suits attributes to Congress an obtuseness sufficient to destroy the statutory scheme. The subject of the legislation is the protection of subcontractors, materialmen, and laborers on contracts for public works of the United States. Congress might have allowed these claimants to sue in

---

[3] There has been much debate whether § 270b(b) is a jurisdiction or a venue statute. See, e.g., Autrey v. Williams and Dunlap, 5 Cir. 1965, 343 F.2d 730; Electronic & Missile Facilities, Inc. v. United States, 5 Cir. 1962, 306 F.2d 554, rev'd on other grounds, 1963, 374 U.S. 167; Lasley v. United States, 5 Cir. 1960, 285 F.2d 98; Comment, 76 Harv. L. Rev. 635 (1963). We agree with the author of the comment that the section has both jurisdictional and venue attributes. It is jurisdictional in that clearly it authorizes suit to be brought in the district court. Autrey v. Williams and Dunlap, supra. On the other hand, it is not jurisdictional in the sense that actions are limited to the federal court to insure uniform or sympathetic interpretation of the Act. It is like a venue statute in that it severely limits the number of forums in which the defendant may be required to answer.

state courts. There is a danger that the amount of the claims (judgments) might exceed the amount of the bond if there should be multiple litigation in state courts. But there are good reasons in support of such a decision: Absent diversity, state courts usually settle disputes between the parties to a construction; besides, the bond is a substitute for the protection a state lien affords. Instead, however, as clearly as good logomachists can, Congress vested exclusive jurisdiction over Miller Act suits in federal courts.

Since only federal courts may determine a surety's liability on a Miller Act bond, a state court judgment that would bind a surety on his Miller Act bond offends the congressional mandate. In these circumstances 28 U.S.C. § 1738 has no application.

The statute itself reflects the national interest in the supplier's remedy and the surety's liability. The plaintiff is denied his usual option to sue in the state courts. Suit must be brought in the name of the United States. And under the Heard Act, the statutory predecessor of the Miller Act, the Supreme Court was able to permit suit without regard to the amount in controversy by regarding such a suit as one in which the United States was a party plaintiff, "not here a merely nominal or formal party". *United States Fidelity & Guaranty Co. v. United States,* 1907, 204 U.S. 349, 356, S.Ct. , L.Ed. . Prime contracts to which the United States is a party are governed by "federal common law". *United States v. Allegheny,* 1944, 322 U.S. 174, 183, S.Ct. , L.Ed. . This Court held in *Transamerica Insurance Company v. Red Top Metal Company,* 1967, F.2d and holds here that federal law controls the supplier's right of action although courts may fill the statutory void as to attorney's fees by incorporating state law. All of the interested parties are assembled in one forum—a federal forum. In short, the surety is entitled to stand on the

congressional decision that a United States district court independently determine the facts and the extent of a surety's liability under a Miller Act bond.

C. We turn now from statutory language to statutory history. The history evidences that Congress focused on venue as well as on jurisdiction.

"The history of the Miller Act is a history of the previous acts and amendments." Stickells, Bonds of Contractors on Federal Public Works—the Miller Act, 36 Boston U. L. Rev. 499, 501 (1956). The first federal legislation requiring bonding on federal construction projects was the Heard Act, adopted in 1894. 28 Stat. 278. It required only a single bond which was to protect both the Government and the suppliers of labor and materials. The Act did not provide exclusive federal jurisdiction but stated simply that suppliers of labor and materials

> shall have a right of action, and shall be authorized to bring suit in the name of the United States for his or their use and benefit against said contractor and sureties and to prosecute the same to final judgment and execution. . . . 28 Stat. 278 (1894).

A subcontractor could sue on the bond prior to completion of the work; the judgment would be satisfied out of the bond and the coverage of the bond reduced by the amount of the judgment. The United States had no priority. The effect was to reduce the bond to a point where it was of little or no protection to the government, and in any event, the government could only share pro rata with the suppliers. See *United States v. Aetna Casualty & Surety Co.*, 2 Cir. 1962, 297 F.2d 665, 667; Cushman, Surety Bonds on Federal Construction Contracts: Current Decisions Reviewed, 25 Fordham L. Rev. 241, 242 (1956); Stickells, *supra*, 36 Boston U. L. Rev. at 501-02.

In order to overcome these difficulties, Congress amended the Act in 1905 to establish a scheme whereby only one suit, in which the United States enjoyed priority over other claimants, was permitted. 33 Stat. 811, 812. All creditors protected by the Act had the right to intervene, and share pro rata what was left after the government's recovery. If they did not intervene, they lost their rights. "Obviously, the single forum was a necessity to this scheme." *United States v. Aetna Casualty Co., supra,* 297 F.2d at 668.

This system, too, proved unsatisfactory. Because of the government priority there were great delays in reimbursing unpaid suppliers. The one-suit provision produced strange and unjust results.[4] Frequently the government's prior claim would exhaust the entire bond. Stickells, 36 B. U. L. Rev. at 503.

> "The Miller Act worked two basic changes in this arrangement: the contractor was required to post two bonds, one protecting the government against failure to perform, the other protecting the subcontractor. The government, being safeguarded by the performance bond, had no direct interest on the payment bond. Each supplier of labor or material was permitted to institute a separate action to recover his claim; the pro rata provisions were dropped, creating a race among subcontractors until the bond was exhausted". *Aetna, supra,* 297 F.2d at 668.

Although these changes eliminated the necessity that Miller Act suits be limited to a single forum, Congress retained that requirement. As Judge Clark noted

---

[4] Stickells tells of one case in which there had been a defect in the first suit filed. Before the defect had been discovered, another claimant filed a second action, which was technically correct. Both actions were dismissed, the first because of its technical deficiency, the second, because the claimant should have intervened in the first suit. The result was that no one recovered. 35 B.U.L. Rev. at 503.

for the *Aetna* court, the reason is not entirely clear. The most plausible explanation, it seems to us, is that the limitation was intended to meet the objections of the surety companies, which had expressed the fear that if the single suit provision were eliminated, they would be exposed to a multiplicity of suits, and could possibly be found liable for an amount in excess of the penal sum of the bond. See Hearings before the Subcommittee on the Judiciary, 74th Cong., 1st Sess., Serial 4, Mar. 8, 22, Apr. 26, May 3, 1935. pp. 49, 96. Although the Act as finally adopted did not grant the sureties the protection of having to defend only one suit, it did require litigation to take place in one or at most a small number of districts.[5] Not only would such a limitation in itself tend to maximize the convenience of the defendant, but by bringing a number of actions together in the same court it would facilitate the consolidation of many actions.[6] This solution provided the surety with some protection while implementing the congressional desire to eliminate the inequities of the one-suit limitation.

The latest chapter in the legislative history of the Miller Act is now being written. The American Law Institute, in its Study of the Division of Jurisdiction Between State and Federal Courts, undertaken at the suggestion of Chief Justice Warren, was confronted with the same problem as Congress—whether to allow suppliers to sue in state courts. The Institute discussed the question in terms of the suppliers' claims and concluded to let well enough alone. This is the concluding paragraph of the discussion:

---

[5] There was one slight change expanding the permissable number of districts from *the* district in which the contract was to be performed to *any* district of performance. See United States v. Aetna Casualty & Surety Co., supra, 297 F.2d at 668.

[6] The Second Circuit's language in United States v. Aetna Surety & Casualty Co., supra, 297 F.2d at 668, text accompanying note 7, might imply that the cited House Report showed a congressional intention that suits not be consolidated. Although the report does indicate that the committee was aware that there might be several suits on each bond, there is no hint that Congress intended to discourage consolidation.

"The conclusion that no jurisdiction amount should be required in Miller Act cases does not necessarily mean that jurisdiction of the federal courts in such cases should be exclusive, as at present. Since the national interest involved is that of protecting subcontractors, materialmen, and laborers in obtaining their just due, there arguably would be no harm in permitting such persons to sue in state court if they feel secure there. To the extent that federal law controls some or all of the issues in such cases, it would do so even though a state forum were chosen. *Free v. Bland,* 369 U.S. 663 (1962). But if the claims should exceed the amount of the bond, there is an advantage in requiring, as at present, that all suits be brought in a single federal court. To use the language of a case which involved the similar provisions of the Capehart Act, *Continental Cas. Co. v. Allsop Lumber Co.,* 336 F.2d 445, 452 (8th Cir. 1964), 'having in mind the legislative history; the policy and the purpose behind the Miller and the Capehart Acts; the variances in state law; the common characteristics of these construction projects; the fact that participants who join in them often come from various parts of the country; the realization that there is a need for a practicable and yet a fair and reasonable means of assembling in one forum all the interested parties who were ready enough initially to devote their constructional abilities to a project in the local area; * * * and the awareness that delay and expense otherwise to be incurred by multiple litigation in geographically separated forums will thereby be avoided * * *,' it is proposed in § 1311(b) to continue exclusive jurisdiction of Miller Act cases without regard to amount in controversy." ALI Jurisdiction Study, Tentative Draft No. 3, April 5, 1965, p. 102.

We therefore hold that a state judgment in a suit between a subcontractor and a prime contractor does not bind the surety in the subcontractor's Miller Act suit against it.

III.

In *Transamerica Insurance Company v. Red Top Metal Company*, No. 22707, decided October 18, 1967, this court held that in a suit under the Miller Act federal law controls. Attorney's fees, if recoverable, are recoverable as an element of the supplier's federally created right of action. In the absence of a specific provision in the Act relating to attorney's fees, the Court looks to state law for content with which to fill the substantive statutory gap. "State law 'governs' only through incorporation into federal law, not through its own force."

Turning now to Florida law, we find that Florida Statutes § 627.0127 and § 627.0905 allow "owners, subcontractors, laborers and material men" to recover attorney fees against the surety in the event of litigation.[7]

---

[7] §627.0127 Attorney fee.—

Upon the rendition of a judgment or decree by any of the courts of this state against an insurer in favor of an insured or the named beneficiary under a policy of contract executed by the insurer, the trial judge shall adjudge or decree against the insurer and in favor of the insured or beneficiary, a reasonable sum as fees or compensation for the insured's or beneficiary's attorney prosecuting the suit in which the recovery is had. Except, that without any prejudice or effect whatsoever as to suits relating to other kinds of insurance, no such attorney fee shall be allowed in any such suit based on a claim arising under a life insurance policy or annuity contract if such suit was commenced prior to expiration of sixty days after proof of the claim was duly filed with the insurer. Where so awarded compensation or fees of the attorney shall be included in the judgment or decree rendered in the case.

§627.0905 Bonds for construction contracts, attorney fees in case of suit.—

(1) Whenever a surety insurer becomes a surety on a contract bond or bonds for either private or public construction in this state, such bond or bonds shall be either:

(a) A combination bond containing both performance and payment provisions and in an amount of not less than the total or estimated contract price, or

(b) Separate bonds for performance and for payment, but in such instances both bonds shall be issued and each shall be in an amount of not less than fifty per cent of the total or estimated contract price.

Section 627.0127 provides for the allowance of reasonable attorney fees against an insurer in favor of an insured or beneficiary under a policy of insurance upon the rendition of a judgment or decree by any of the Courts of the State of Florida. Section 627.0905, provides that surety bonds for construction contracts contain both performance and payment provisions, and that Section 627.0127, allowing attorney fees, apply to such bonds, the purpose being to protect and indemnify owners, subcontractors, laborers and materialmen against loss. Such persons are defined as insureds or beneficiaries within the meaning of Section 627.0127, Florida Statutes.

Erie has no application here. For purposes of borrowing state law and policy to fill an interstice in the Miller Act, it is irrelevant that § 627.0905 in terms applies only to payment bonds "written under the laws of Florida".

Similiarly, there is no merit to the contention that the applicable Florida statutes were enacted after the execution of the bond and that therefore their language cannot be read into the language of the board. (They were enacted in 1959 three years before the litigation

---

(2) Section 627.0127 (attorney fee) shall also apply as to suits brought by owners, subcontractors, laborers and material men against a surety insurer under payment or performance bonds written by the insurer under the laws of Florida to indebnify such owners, subcontractors, laborers and material men against pecuniary loss by breach of a building or construction contract, except, that the amount to be so recovered for fees or compensation of such a plaintiff's attorney shall not be more than twelve and one-half per cent of the amount which the judgment or decree awards such plaintiff under the bond (exclusive of the costs of suit and attorney fees or compensation), nor shall it be less than one hundred dollars where the judgment or decree is for more than five hundred dollars nor less than fifty dollars where the judgment or decree is five hundred dollars or less. Such owners, subcontractors, laborers and material men shall be deemed to be "insureds" or "beneficiaries" for the purposes of this section.

began.) We agree with the district judge that the statutes should be given a retroactive effect. See *United Fire Insurance Co. v. Dickerson,* 1921, 19 So. (Fla.) 613.

Finally, the appellant argues that the amount of the attorney's fees is excessive. We express no opinion on that point. We suggest, however, that the district court conduct a hearing in order to determine the reasonableness of the fees.

IV.

Fidelity and Guaranty raises three additional points which merit only the briefest discussion. First the surety points out that but for its agrement to the extension of the contract, Hendry's claim would have been lost. At the time of the extension, the surety agreed to increase the penal sum of the bond by some $65,000. Since it is liable only because of the extension agreement, the surety argues, its liability should be limited to the amount of the increase in the penal sum. The argument is totally without merit. As long as Hendry may properly sue, he is entitled to the benefit of the full penal sum of the bond, less, of course, any claims already paid.

The surety's next point is that Hendry and Smith were joint venturers. The basis for the assertion is that the agreement between Smith and Hendry called for Hendry to receive bare plant rental plus a one-half share of whatever profit was realized from Smith's government contract. Finally, Fidelity & Guaranty asserts that it is not liable for the "profit" portion of the contract price agreed upon by Smith and Hendry. Both these questions may more properly be resolved upon the trial on the merits than in the factless setting of an appeal from a summary judgment. Since the resolution of another issue requires us to remand for a trial, we decline to decide these last two points.

The judgment of the district court is REVERSED, and the case is REMANDED to that court for a trial on the merits.

GODBOLD, Circuit Judge, dissenting:

I dissent from the holding of the majority that a state court determination of liability of the principal is to be given no collateral estoppel effect in a Miller Act suit against the surety in federal court.

Federal jurisdiction over Miller Act claims is exclusive. There is no equivocation in the words of the statute as to where venue properly lies. But statutory pronouncement of jurisdiction and venue do not answer the question presented here.

The usual role of suretyship law is as stated by the majority, that if the surety has full knowledge and opportunity to defend a suit against the principal, a judgment against the principal is conclusive against the surety (absent fraud and collusion). See *Lake County ex rel. Baxley v. Massachusetts Bonding & Ins. Co.*, 75 F.2d 6 (5th Cir. 1935); *Seaboard Surety Co. v. Westwood Lake, Inc.*, 277 F.2d 397 (5th Cir. 1960). Fidelity & Guaranty had knowledge of the suit against its principal and an opportunity to defend it. Both the state court proceeding against the principal and the federal suit on the bond took place in Pensacola, Florida. The same attorneys represented the principal in state court and the surety in federal court. Though the state suit was filed long before the federal suit it lay dormant, and in the active stages of litigation, the two cases proceeded more or less concurrently.

Were it not for the Miller Act there would be no doubt of the applicability of the normal principal-surety rule to the circumstances of this case. We are called upon to decide whether the language and legislative history of the Miller Act preclude application of this rule to Miller Act cases.

I dissent from the conclusion of the majority. It is inconsistent with all previous Miller Act case law I am able to find on the subject. It is in violation of the terms and policy of the federal full faith and credit statute, 28 U.S.C.A. § 1738.

The usual rule referred to above has long been applied in Miller Act and Heard Act cases without regard to whether the judgment against the principal was obtained in state or federal court. *Massachusetts Bonding & Ins. Co. v. Robert E. Denike, Inc.*, 92 F.2d 657 (3d Cir. 1937) (state court judgment); *United States ex rel. Larkin v. Maryland Casualty Co.*, 45 F. Supp. 286 (D. Mass. 1942) (state court judgment); *Herzog v. DesLauriers Steel Mould Co.*, 46 F. Supp. 211 (E.D. Pa. 1942) (federal court judgment). Compare *United States ex rel. Vigilanti v. Pfieffer-Neumeyer Constr. Corp.*, 23 F. Supp. 403 (E.D.N.Y. 1938).

Section 1738, 28 U.S.C.A., provides an independent ground requiring that effect be given to the state adjudication in the case before us. (That section was not mentioned in *Massachusetts Bonding* and *Larkin*.) The effect which must be accorded a state judgment by a sister state is governed by the full faith and credit clause of the Constitution.[1] In 1790 the Congress acted to extend the force of the full faith and credit clause to federal courts. Act of May 26, 1790, 1 Stat. 122.[2] This act, as amended, but with the operative language substantially unchanged, now appears at § 1738.

---

[1] U.S. Const. art. 4, § 1: "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved and the Effect thereof."

[2] "The acts of the legislature of any State or Territory, or of any country subject to the jurisdiction of the United States, shall be authenticated by having the seals of such State, Territory, or country affixed thereto. The records and judicial proceedings of the courts of any State or Territory, or of any such country, shall be proved or admitted in any other court within the United States, by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, that the said attestation is in due form. And the said records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the States from which they are taken."

As a general proposition § 1738 requires federal courts to give state adjudications the same effect they would have in the rendering jurisdiction. *Union & Planters' Bank v. City of Memphis,* 189 U.S. 71, 23 S.Ct. 604, 47 L.Ed. 712 (1903); *Wayside Transp. Co. v. Marcell's Motor Express, Inc.,* 284 F.2d 868 (1st Cir. 1960); see *Midessa Television Co. v. Motion Pictures for Television, Inc.,* 290 F.2d 203 (5th Cir. 1961), *cert. denied,* 368 U.S. 827, 82 S.Ct. 47, 7 L.Ed. 2d 30 (1961); *Rich v. Naviera Vacuba, S.A.,* 197 F. Supp. 710 (E.D. Va.), *aff'd,* 295 F.2d 24 (4th Cir. 1961) (dictum). As with the full faith and credit clause itself it is always permissible for the court in which a prior judgment is asserted to inquire into the jurisdiction of the rendering court. Otherwise the rule appears to permit no exceptions, and in the absence of the Miller Act would require the federal court to give collateral estoppel effect to a state court determination of identical issues in litigation on another cause of action. See *United States v. Silliman,* 167 F.2d 607 (3d Cir.), *cert. denied,* 335 U.S. 825, 69 S.Ct. 48, 93 L.Ed. 379 (1948).

The question thus becomes whether by enacting the Miller ct in 1935 the Congress created an exception to the operation of § 1738. I find nothing to indicate that it did.

It is readily apparent that there is no pertinent express repealer incorporated into the provisions of the Miller Act.[3] If § 1729 was affected by passage of the Miller Act it was by implication.

Repeals by implication are not favored, and where possible statutes with potentially inconsistent provisions will be construed so as to give effect to both. See *United States v. Zacks,* 375 U.S. 59, 84 S.Ct. 178, 11 L.Ed. 2d 128 (1963). Unless there is "some manifest inconsist-

[3] The Miller Act contained a provision which repealed its predecessor, the Heard Act. Act of Aug. 24, 1935, c. 642, § 5, 49 Stat. 794. But the repealer purported to have no further effect.

ency or positive repugnance between the two statutes" we are required to construe them harmoniously. *Mercantile Nat'l Bank v. Langdeau,* 371 U.S. 555, 83 S.Ct. 520, 9 L.Ed. 2d 523 (1963); *United States v. Borden Co.,* 308 U.S. 188, 60 S.Ct. 182, 84 L.Ed 181 (1939). At the most repeal by implication has limited vitality, and it falls to its lowest ebb, if having any scope at all, when asserted in derogation of a statute which incorporates into federal-state jurisprudence a principle of state-to-state jurisprudence that is of constitutional dimension.

Through the full faith and credit clause "local doctrines in res judicata . . . become a part of the national jurisprudence." *Riley v. New York Trust Co.,* 315 U.S. 343, 349, 62 S.Ct. 608, 86 L.Ed. 885, 891 (1942). Section 1738 was enacted to extend the full faith and credit concept to the federal courts. The implied repeal or limitation of a statute with such fundamental constitutional underpinnings would require a "manifest inconsistency" of the highest order, if, indeed such a statute can be rescinded or modified in any way other than by direct congressional pronouncement. Nor should the courts, in a particular type of case, lightly carve out of "the national jurisprudence" established doctrines of res judicata in their stead for that particularized situation only.

It has long been recognized that the dominant motive underlying passage of the Miller Act was protection of subcontractors and materialmen by requiring the contractor to post a separate bond to insure their prompt payment.[4] Such a construction is fully supported by the

---

[4] See, *e.g.,* United States *ex rel.* Sherman v. Carter, 353 U.S. 210, 77 S.Ct. 793, 1 L.Ed. 2d 776 (1957); Clifford F. MacEvoy Co. v. United States *ex rel.* Calvin Tomkins Co., 332 U.S. 102, 64 S.Ct. 890, 88 L.Ed. 1163 (1944); St. Paul Fire & Marine Ins. Co. v. United States *ex rel.* Dakota Elec. Supply Co., 309 F.2d 22 (8th Cir. 1962), *cert. denied,* 372 U.S. 936, 83 S.Ct. 883, 9 L.Ed. 2d 767 (1963); United States *ex rel.* J. A. Edwards & Co. v. Thompson Constr. Co., 172 F. Supp. 161 (S.D.N.Y.), *aff'd* 273 F.2d 873 (2d Cir. 1959), *cert. denied,* 362 U.S. 951, 80 S.Ct. 864, 4 L.Ed. 2d 869 (1960).

legislative history. See generally S. Rep. No. 1238, 74th Cong., 1st Sess. (1935); H.R. Rep. No. 1263, 74th Cong., 1st Sess. (1935); *Hearings on Bonds of Contractors on Public Works Before a Subcomm. of the House Comm. on the Judiciary,* 74th Cong., 1st Sess., ser. 4 (1935). There is no basic inconsistency between this protection and the terms of § 1738. In the absence of a "manifest inconsistency or positive repugnance" between the statutes, we must assume that Congress enacted the Miller Act in light of § 1738, and, construing them so as to give effect to both, must conclude that in a suit against a Miller Act surety a federal court is required to give a prior state adjudication in a suit by a subcontractor against the principal the same effect as by law or usage the courts of such state would give. One need not speculate on what effect a Florida state court, in a suit against the surety, would give to a prior Florida state judgment against the principal. *Seaboard Surety, supra,* was a Florida case and cites the Florida state law. *Lake County, supra,* was a Florida case also, though citing general authorities.

Finally, I do not read the congressional history and intent as do the majority, who dilute the long-recognized statutory purpose of the Miller Act—protection of suppliers and subcontractors—by deducing an unexpressed congressional intent in enactment of the same Act to protect surety companies from inconvenience. This 180-degree change in direction is based upon congressional retention of the exclusive jurisdiction provision when the separate payment bond was provided for and separate actions thereon permitted by the various suppliers. A representative of the surety industy, before the House committee, expressed the fear that if subcontractors were permitted to maintain separate suits in their own state courts a likely result would be that the surety would be required to pay more than the face amount of

the penalty bond.[5] As I read this statement it is clear that the witness was referring to a provision included in one of several bills pending before the committee, H.R. 4461, 74th Cong., 1st Sess. (1935), which would have permitted actions *on the bond* to be "commenced in any court of competent jurisdiction in the State wherein the contract is to be performed." The sureties wanted retention of the single suit provision. Congress rejected this in favor of allowing multiple claimants' suits *on the bond,* but continued the principle of exclusive federal jurisdiction for suits *on the bond* against the surety, which laid to rest the apprehension of the surety companies of possible liability in excess of the bond penalty. Subject to a nominal exception[6] a single federal court now has, as it had in the past, responsibility for ascertaining ultimate liability of the surety, and that court can, and no doubt will, see to it that judgments are not entered by it against the surety exceeding the penal sum of the bond. As Judge Clark spelled out in *United States ex rel. Bryant Elec. Co. v. Aetna Casualty & Surety Co.,* 297 F.2d 665 (2d Cir. 1962), the Act created " a race among sub-contractors *until the bond was exhausted.*"

---

[5] "If you have a dual bond, unless you have the form very carefully prescribed in which suit must be brought you may render it impossible for the surety companies to write bonds. If, for example, under one of these present pending bills you can sue in any court —now, you gentlemen know full well what would happen if in the District of Columbia—I will keep away from it—if in Maryland a job is being performed and we had a performance bond under which a man from California and a man from Texas and a man from Michigan, and a man from Maine were all furnishing materials they would all sue in their own States. If that were the case, we might have to pay the penalty of the bond three or four times. I frankly tried to find authority for it, and I cannot find any very substantial authority for the proposition that we could plead in California the rendition of a judgment against us in Maine, reducing the penalty on the bond." *Hearings on Bonds of Contractors on Public Works, supra* at 48.

[6] The Heard Act limited suit to one district—*the* district in which the contract was to be performed. The Miller Act amended this provision to permit suit in *any* district in which performance would occur. See United States *ex rel.* Bryant Elec. Co. v. Aetna Casualty & Surety Co., 297 F.2d 665, 668 (2d Cir. 1962); n. 5 of majority opinion.

I find nothing in the legislative history evidencing that Congress reached any conclusion on the manner in which, in a suit against the surety of the court having jurisdiction thereof, liability and damages are to be determined, or whether the normal rules of collateral estoppel applied to principal and surety were to be changed (or that Congress even dealt with these subject matters). *Aetna,* after discussing the various surety company requests that Congress would not accede to, says: "Thus the section retained scant utility save as a convenience to the defendants." 297 F.2d at 668. Nothing in *Aetna* suggests that the phrase "convenience to the defendants" is in any way related to or concerned with the privilege of being exempted from the normal rules of collateral estoppel.

Quite clearly there was no congressional mandate against multiplicity of suits—in fact, rather than retaining for each payment bond the Heard Act's single suit requirement, as it might have done, Congress allowed each claimant to file a separate action. Congress refused to heed the request of surety company officials for retention of the single suit for all creditors, and declined to adopt a proposed bill that included the single suit requirement. H.R. 5054, 74th Cong., 1st Sess. (1935). Also the shift from one to several possible districts (see n. 5, *supra*) *reduced* the possibility that suits could be consolidated. See *Aetna, supra* at 668.

I see no basis for deviating from the normal rules of collateral estoppel, from the previous federal cases applying those rules in Heard Act and Miller Act cases, from the federal full faith and credit statute, and from the basic purpose, until now recognized, of the Miller Act. "The primary aim of the Miller Act was to *secure greater protection* for the subcontractor . . . and *to facilitate suit* by those supplying labor or materials to the general contractor." *Aetna, supra* at 668-69. I would affirm.

APPENDIX II

UNITED STATES of America, to the Use of HENDRY CORPORATION,

Plaintiff,

v.

SMITH ENGINEERING AND CONSTRUCTION COMPANY, a Florida corporation, and United States Fidelity & Guaranty Corporation of Maryland, Defendants.

Civ. A. No. 1223.

United States District Court

N. D. Florida,
Pensacola Division.

April 7, 1965.

CARSWELL, Chief Judge.

The use plaintiff Hendry moves for summary judgment seeking to recover from defendants under the provisions of the Miller Act for labor and materials supplied to Smith Engineering and Construction Company pursuant to a written contract. The contractual relationship and obligations arising thereunder between Hendry and Smith have been determined in a chancery proceeding in the Circuit Court of Escambia County, Florida. A certified true copy of the final decree entered by the State Court on July 13, 1964 is incorporated by reference and made a part of the pleadings. United States Fidelity and Guaranty Corporation was not a party to the state litigation.

The following questions are raised:

Is the decision of the state case conclusive evidence as to the amount actually owed to plaintiff?

Is Hendry entitled to recover interest and attorney's fee, and, if so, in what amount?

United States Fidelity and Guaranty Corporation contends that the state case was not binding upon it since it was not joined in that proceeding. It does not, however, deny having knowledge of the state case. As a matter of fact, the attorney for Smith in the state was also the attorney of record for United States Fidelity and Guaranty Corporation at that time.

The controlling case law does not support the position of the defendant surety. In the case of Lake County for Use and Benefit of Baxley v. Massachusetts Bonding and Isurance Co., 75 F.2d 6 (C.A.5, 1935), as cited with approval in Seaboard Surety Company v. Westwood Lake, Inc., 277 F.2d 397, at page 403 (C.A.5, 1960), the Court stated:

> " * * * we think the true statement of the law is this: Where it appears that the judgment against the defendant was obtained in a suit of which the surety had full knowledge, and which it had full opportunity to defend, the judgment therein is not only evidence, but conclusive evidence, against every defense except that of fraud and collusion in obtaining it. (authorities) Where it is not made to appear that the surety knew of and had opportunity to defend the suit, then the judgment is prima facie evidence that the surety is liable, sufficient to support a verdict unless it is rebutted by proof on the part of the surety that it was obtained through fraud or collusion, or that the loss or liability created by the judgment arose from acts other than those indemnified against under the conditions of the bond."

The facts of the present case fall within the purview of this language. The rule of Seaboard Surety Company, supra, is applicable. United States Fidelity and Guaranty Company is bound by the state case wherein the amount owed Hendry by Smith was found to be $78,689.92 exclusive of interest and costs.

With respect to the questions of interest and attorney's fees, the Court notes initially that:

> " * * * in suits under the Miller Act, the recovery of interest, costs, and attorney's fees is governed by the state law." United States v. Texas Construction Company, 237 F.2d 705 (C.A.5, 1955).

and also that:

> "The Supreme Court of Florida has long recognized that in actions ex contractu it is proper to allow interest at the legal rate from date the debt was due * * * The rule is that if it is finally determined that the debt was due, the person to whom it was due is entitled not only to the payment of the principal of the debt but to interest at the lawful rate from the due date thereof." Huntley v. Baya, 136 So.2d 248 (Fla. App. 3., 1962).

In accordance with this rule, the interest awarded plaintiff was computed by the state court at 6% per annum from June 21, 1961, the date on which the dispute between Smith and the Corps of Engineers was determined. The amount of interest that had accrued from June 21, 1961 until July 13, 1964, the entry date of the final decree, was calculated to be $14,423.87. The total amount of the State judgment for Hendry was thus $78,689.92 plus accrued interest of $14,423.87, totalling $93,113.79. The Court concludes that the State judgment is binding on both defendants in this action, and does not, therefore, review here the alternative issue presented by defendant with respect to the computations leading to adjudication.

Finally, is Hendry entitled to an award for attorney's fee?

Defendant United States Fidelity and Guaranty Corporation asserts four separate grounds which it says compels a negative answed: (1) The contract was exe-

cuted in the State of Alabama, not in the state of Florida. This bare fact is meaningless in the context here. First the Miller Act itself requires that all suits brought "in the United States District Court for any district in which the contract was to be *performed* and executed and not elsewhere * * *." Under the doctrine of Erie Railroad Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1937), therefore, the substantive law of Florida controls, and this is so with respect to any issues with respect to interest. See United States v. Continental Casualty Co., 303 F.2d 91 (C.A.4, 1962). Under this same rationale it seems clear that the allowance of attorney's fee is a matter controlled by the law of the state wherein the contract was to be performed, in this case, the law of Florida.

Secondly, defendant United States Fidelity and Guaranty Corporation objects to the allowance of attorney's fee by pointing to the fact that the applicable Florida statutes (F.S. § 627.0905, F.S.A., and F.S. § 627.0127, F.S.A.) were enacted after the execution of the bond, and contending, therefore, that their language cannot be read into the language of the bond itself.

This argument overlooks the basic nature of these legislative requirements. They are, as the Florida courts have made quite clear, enacted under the state's exercise of police power and are, fundamentally, in the nature of a penalty.

> "The statute provides that, upon rendition of a judgment or decree by [a Florida Court] against any life or fire insurance company * * * there shall be adjudged or decreed against such insurance company * * * a [reasonable attorneys' fee for plaintiff's attorneys] * * *
>
> "The attorneys' fees provided for in our statute are in the nature of a penalty * * *. The statutes are sustained under the doctrine that attorneys' fees may be imposed * * * under the police power of the

state as a kind of penalty incurred in the conduct of a business affected with a public interest." United States Fire Ins. Co. v. Dickerson, 82 Fla. 442, 90 So. 613, 615, 616 (1921)..

All contracts are subject to regulation by the valid exercise of police power of a state, even the future exercise of such power if it is designed to protect the general welfare. See East N. Y. Savings Bank v. Hahn, 326 U.S. 230, 66 S.Ct. 69, 90 L.Ed. 34.

The subject Florida statutes are manifestly in such category, and the fact of their enactment subsequent to the signing of the contract here is of no consequence.

Finally, defendant United States Fidelity and Guaranty Corporation contends that Section 627.0905 is applicable only to payment bonds "written by the insurer under the laws of Florida." It says that the bond here was written to comply with Federal law, i. e., the Miller Act, and without respect to the laws of Florida.

The Court concludes that this Florida statute is not to be construed so narrowly. Its impact is not limited to bonds required by the State of Florida. In any event the Florida legislature has put down the affirmative requirement in F.S. § 624.11, F.S.A., that:

> "No person shall transact insurance in Florida, or *relative* to a subject of insurance * * * *to be performed in Florida without complying with the applicable provisions of this code.*" (Emphasis added.)

The Court also notes in this connection that the United States District Court for the Middle District of Florida has held attorneys fees to be recoverable in Florida under the Miller Act. See Baldwin-Lima-Hamilton Corporation v. United States Fidelity and Guaranty Company, wherein Judge Simpson squarely held attorney's fees recoverable, in Florida, under the Miller Act. See Florida Bar Journal, April, 1963, p. 221.

In accordance with Rule 56 of the Federal Rules of Civil Procedure, the Court concludes that use plaintiff is entitled to summary judgment on the issues raised by the complaint as amended since the Court finds on the basis of the pleadings, affidavits and the exhibits attached thereto, that it is affirmatively shown that there is no genuine issue as to any material fact and that the use plaintiff is entitled to judgment as a matter of law.

It is, therefore, upon consideration, hereby

Ordered that motion of the use plaintiff for summary judgment be and it is hereby granted for the use plaintiff and against the defendants, jointly and severally.

Judgment will be entered accordingly.

LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
OCT 21 1968
JOHN F. DAVIS, CLERK

Supreme Court of the United States

OCTOBER TERM, 1968

No. 537

HENDRY CORPORATION,
Petitioner,

versus

UNITED STATES FIDELITY AND GUARANTY COMPANY,
Respondent.

RESPONDENT'S BRIEF OPPOSING REVIEW.

E. DIXIE BEGGS,
Of BEGGS, LANE, DANIEL, GAINES & DAVIS,
P. O. Box 1351,
Pensacola, Florida 32502,
Attorneys for Respondent.

INDEX.

	Page
THE QUESTION INVOLVED IN THE COURT OF APPEALS DECISION	2
THERE IS NO CONFLICT OF DECISIONS	3
CONCLUSION	9
CERTIFICATE OF SERVICE	9

TABLE OF AUTHORITIES.

Cases:

Massachusetts Bonding & Ins. Co. v. Robert E. Denicke, Inc., 92 F.2d 657 (3d Cir. 1937) 1, 3, 4, 7

Modern Brokerage Corporation v. Massachusetts Bonding & Ins. Co., 54 F.Supp. 939 (S.D. N.Y. 1944) 7

United States for Use and Benefit of Capolino Sons, Inc. v. Electronic & Missile Facilities, Inc., 364 F.2d 705 (2d Cir. 1966) ... 2, 6, 7

United States for Use and Benefit of Frank A. Trucco & Co. v. Bergman Const. Corp., 256 F.2d 851 (7th Cir. 1958) 7

Statutes:

33 Stat. 811 2

Title 40 USC, Section 270(b) 1, 2

SUPREME COURT OF THE UNITED STATES

October Term, 1968

No. 537.

HENDRY CORPORATION,

Petitioner,

versus

UNITED STATES FIDELITY AND GUARANTY COMPANY,

Respondent.

RESPONDENT'S BRIEF OPPOSING REVIEW.

Respondent respectfully opposes the issuance of the Supreme Court's discretionary writ for review of the decision herein by the United States Court of Appeals, Fifth Circuit.

The Court of Appeals decision does not, as claimed in the petition, present questions under the Miller Act (40 USC 270b) which in anywise affect the state-federal judicial relationship; and if, *arguendo*, the decision does present any such question, it can never have application to more than an infinitely narrow segment of the national community.

Neither is the decision in conflict with the decisions made in *Massachusetts Bonding & Ins. Co. v. Robert E. Denike, Inc.*, 92 F.2d 657 (3d Cir. 1937),

nor in *United States for Use and Benefit of Capolino Sons, Inc. v. Electronic & Missile Facilities, Inc.*, 364 F.2d 705 (2d Cir. 1966).

THE QUESTION INVOLVED IN THE COURT OF APPEALS DECISION.

A.

The Fifth Circuit decision deals with the enforcement of a right which exists solely by virtue of an act of the Congress which specifies the exclusive method and means of enforcement, against the surety on a bond given for the sole purpose of fulfilling the demands of that act. Since 1905 the present and prior federal statutes (Heard Act, 33 Stat. 811; Miller Act, 40 USC 270) have specified in identical language that actions on such bonds shall be brought in the United States District Court "and not elsewhere." No question of state-federal judicial relationship can be presented by the refusal of a federal court to translate, without hearing or trial, a subcontractor's state court judgment against a federal public works contractor into a federal court judgment against the contractor's surety on a bond given to conform to a federal statute which vests exclusive judicial enforcement in the federal courts.

Logic fully supports the conclusion of the Court of Appeals that in these circumstances the full faith and credit argument "'offends the Congressional mandate" (R. 127).

B.

The infinitesimal of public involvement in the decision is manifest from the actuality that in all of the more than sixty years between the time when the Congress first ordained that actions on public works bonds should be maintained in the United States District Court "and not elsewhere" and the 1968 decision in the case at bar the federal appellate courts have been called upon only once to weigh the effect of a state court judgment upon the surety.

Massachusetts Bonding & Ins. Co. v. Robert E. Denike, Inc., supra.

Much less serving no public benefit, a review of the decision in this case (even a reversal) would not even serve the purpose of resolving the litigation between the parties; for there remains to be adjudicated by the District Court the issue of whether Hendry Corporation is a joint-venturer with the prime contractor without the protections of the statutory bond.

THERE IS NO CONFLICT OF DECISIONS.

A.

The decision of the Third Circuit in *Massachusetts Bonding* is that a Heard Act surety which *participates* in a state court action brought by an electrical subcontractor against the surety's principal (the

prime contractor) is, *by the surety's participation*, concluded *as to the issues decided by the state court.*

No court of appeals has previously decided whether the surety would be bound by a judgment in a state court proceeding in which the surety did not participate. That question is the issue which was made in the present case, and the Fifth Circuit has resolved the issue in favor of the surety.

Respondent recognizes that the Fifth Circuit said in its opinion (R. 131):

> "We therefore hold that a state judgment in a suit between a subcontractor and a prime contractor does not bind the surety in the subcontractor's Miller Act suit against it."

That this statement correctly construes the Miller Act finds strong support in the plain language of the statute, but the point is not for argument in this brief. The nub of the proposition here is that the respondent surety did not participate in the state court case and the decision that this surety is not concluded by the state court judgment is not in conflict with the holding in *Massachusetts Bonding* that by participation the surety concludes itself.

In its effort to make conflict petitioner seizes upon a comment in the District Court's opinion that the surety was for a time represented in the federal court by the same attorney who had been counsel of

record for the contractor in the state court proceeding since 1957. This is the fact. That this fact is not significant is apparent from the chronology as disclosed by the record:

October 24, 1957 (R. 93)—William Fisher, Jr., counsel for the prime contractor, served and filed an answer in the state court proceeding.

April 16, 1962 (R. 1)—Hendry filed Miller Act complaint in the U. S. District Court joining as defendants both the contractor-principal and its surety.

April 23, 1962 (R. 6)—William Fisher, Jr., Esquire, acting as counsel for both the principal and surety answered the Miller Act complaint.

November 19, 1962 (R. 58)—Trial of the suit against the contractor in the state court was commenced.

May 16, 1963 (R. 85)—Independent counsel appeared for the surety in the Miller Act case.

July 13, 1964 (R. 93-98)—Judgment was entered against the contractor in the state court.

It is the legal obligation of a principal to indemnify his surety against loss and expense. It is common practice for the principal, in discharging this obligation, to arrange for his counsel to answer for the surety also. For Mr. Fisher, who had been representing the contractor in the state court proceeding for five

years, to answer for the contractor and also for its surety a federal suit complaint by the subcontractor does not constitute *participation by the surety* in the state court suit.

There is no question but that the surety here had knowledge of the state court case. Neither is there any question that the surety was a defendant in direct Miller Act litigation. The Third Circuit concerned itself with participation by the surety, not knowledge of the surety.

Actually none of the issues which would arise in the trial of this Miller Act suit were determined in the state court. The judgment of the state court was that "Smith owes Hendry as per account stated between the parties" (R. 93, 96). The state court Judge dictated into the transcript of trial his holding that the basis of the contractor's liability is the contractor's estoppel to deny the debt (R. 58, 59).

Essentially ACCOUNT STATED is a subsequent independent (express or implied) promise to pay. The state court did not undertake to decide any of the Miller Act issues presented in the United States District Court.

B.

Petitioner also urges that the Fifth Circuit decision is completely at variance with the approach of the Court of Appeals for the Second Circuit in *United*

States for Use and Benefit of Capolino Sons, Inc. v. Electronic & Missile Facilities, Inc., 364 F.2d 705 (2d Cir. 1966), cert. dismissed 385 U.S. 924.

The holding in *Capolino* is that where, by the terms of the subcontract the parties have agreed to arbitrate disputes, upon the *joint petition* of the general contractor and his surety made in a Miller Act suit, the court will stay the suit pending arbitration. The joinder of the surety in seeking arbitration is the *participation* which *Massachusetts Bonding* holds concludes the surety. In the case at bar there was no participation by the surety in seeking an extrafederal determination of the subcontractor's claim.

United States for Use and Benefit of Frank A. Trucco & Co. v. Bergman Const. Corp., 256 F.2d 851 (7th Cir. 1958), is an earlier case which considered the surety's status with respect to an arbitration clause in the subcontract. There the Seventh Circuit in its opinion cited with approval *Modern Brokerage Corporation v. Massachusetts Bonding & Ins. Co.*, 54 F.Supp. 939 (S.D. N.Y. 1944), wherein the District Court said:

> * * * "The answer verified by an officer of the surety company 'claims the right to submit the questions in dispute herein to arbitration.' The surety had no such right. The questions in dispute were, it is plain, the issues in the action. At most, the surety had the right to demand that

the action be stayed until the owner's right to compel arbitration of disputes arising under the contract between the owner and contractor was given effect." *Without its consent, the surety could not be bound.* (Citations omitted. Emphasis added.)

C.

Through the cases with which it is claimed *Hendry* is in conflict runs the cogent thread that the surety's express or implied consent is essential to the conclusion of the surety by a determination made outside the federal court. Despite the unnecessarily broad language of the Fifth Circuit in its opinion, that opinion does not say, and cannot be stretched to say, that a Miller Act surety would not be concluded by the decision of some other court or body by which the surety had expressly or impliedly agreed to be bound. There is no conflict between the decisions of the courts of appeal.

CONCLUSION.

The petition for writ of certiorari should be denied.

.....

E. DIXIE BEGGS,
Of BEGGS, LANE, DANIEL, GAINES & DAVIS,
P. O. Box 1351,
Pensacola, Florida 32502,
Attorneys for Respondent.

CERTIFICATE OF SERVICE.

I DO HEREBY CERTIFY that copy hereof has been furnished to the following by mail:

STANLEY W. ROSENKRANZ, ESQ.,
CHARLES W. PITTMAN, ESQ.,
MACFARLANE, FERGUSON, ALLISON & KELLY,
P. O. Box 1531,
Tampa, Florida 33601.

Done this .... day of ....., 1968.

.....

E. DIXIE BEGGS.